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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 403

JOSEPH KESHNER,
Petitioner and Cross-Respondent,

vs.

MARTIN M. WICK,
Respondent and Cross-Petitioner.

PETITION FOR CROSS-WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

The judgment of the Court of Appeals for the Eighth Circuit which is the subject of this petition for cross-writ of certiorari by Martin M. Wick is the same judgment which is the subject of a petition for writ of certiorari now on file in this Court in behalf of Joseph Keshner, respondent in this petition. It has not yet been acted upon by this Court. Martin M. Wick was the plaintiff in this cause in the District Court and the appellant in the Court of Appeals; Joseph Keshner was the defendant in this cause in the District Court and the appellee in the Court

of Appeals. Wick sought $15,000 actual and $15,000 punitive damages in his action in the District Court, but the District Court awarded him $3,111.50 only. He appealed to the Court of Appeals, alleging error in the failure to award him the larger amount. Keshner took no appeal. The Court of Appeals affirmed. Keshner's contentions in the Court of Appeals that the District Court was in error in awarding even the lesser sum were denied on the ground that since he had not appealed he could be heard only in support of the District Court judgment. Keshner's petition for certiorari now lodged in this Court seeks the review of this aspect of the judgment of the Court of Appeals; Wick's petition for a cross-writ, now presented, seeks the review of the judgment of the Court of Appeals in affirming the District Court as to its finding that Wick was not entitled to the larger sum originally sued for.

(a) **Reference to Reports of Opinions Below.**

The Judge of the District Court filed a written opinion. It is set forth in the printed record in the Court of Appeals, at pages 76-82. It is not reported officially or unofficially.

The opinion of the Court of Appeals is reported in 244 F. 2d at page 146. It is appended to this petition.

(b) **Grounds on Which Jurisdiction Is Invoked.**

(i)

The date of the judgment of the Court of Appeals sought to be reviewed is May 7, 1957.

(ii)

A petition for rehearing in the Court of Appeals was duly filed by the appellant there, cross-petitioner here. It was denied on May 31, 1957.

The statutory provision believed to confer on this Court jurisdiction to review the judgment is 28 U. S. C., Sec. 1254 (1).

(c) Questions Presented for Review.

The questions presented for review are:

1. Whether the decision of the Court of Appeals now sought to be reviewed has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervision when such decision is based upon an opinion which

(a) incorrectly construes a conclusion of law by the District Court as a finding of fact, and gives binding effect to it as such,

(b) reaches a conclusion which is patently a non-sequitur in respect of the facts recited, and

(c) ignores uncontradicted evidence, and voices conclusions inconsistent therewith.

2. Whether the decision of the Court of Appeals, based on an opinion subject to the infirmities aforesaid, has actually operated to deny to the cross-petitioner the review by the Court of Appeals to which he was under the law entitled.

(d) No Constitutional or Statutory Provisions on Cross-Writ Sought.

No constitutional provisions, treaties, statutes, ordinances or regulations are involved.

(e) **Concise Statement of Case.**

The claim upon which the action below was based arose out of a transaction between Wick, a manufacturer of Highland, Ill., and Keshner, a cattle trader and dealer of New Florence, Mo., in February, 1952. The transaction involved the payment by Wick to Keshner of the sum of $15,000, and the undertaking by Keshner to allot to Wick 15 Aberdeen-Angus cattle in consideration of the payment. The cattle were to be segregated, but they were to be kept for Wick on Keshner's stock ranch, The Good Earth Farm, near New Florence, for an indefinite period.

The exact nature of the transaction, in respect of its legal consequences, is a matter of controversy: Keshner contended below that it was a simple bargain and sale of 15 cows; while Wick contended that the circumstances of the transaction, including his inexperience contrasted with Keshner's experience and the conceded fact that the right of selection of the animals was lodged with Keshner, made it more than a simple bargain and sale and in fact made Keshner his fiduciary, accountable to him for the $15,000 payment as for a trust fund. Wick also contended that Keshner had represented to him, as an inducement to get him to invest, that the animals selected would be reasonably worth not merely $1,000 a head, the amount necessary to equal the investment, but $2,000 a head, the reason for his generosity being that Keshner wished to expand his clientele so as to include young businessmen of southern Illinois, and also that Keshner was in immediate need of cash for tax purposes.

Wick also contended that Keshner had agreed with him that he could withdraw his investment, or recapture his payment, on demand; and, in his complaint, recounted other circumstances, including representations by Keshner, inducing him to enter into the transaction.

The complaint set forth that Keshner, notwithstanding his obligation to allot animals having a fair value at least equal to Wick's investment of $15,000, allotted animals having a value of about one-half that sum; and Count I sought to charge Keshner as a fiduciary with the return of the sum deposited with or paid him. Count II was based on a simple contract theory that Keshner had agreed to allot animals worth at least the amount paid, but did not, and was thus liable to Wick.

Both counts recited that Keshner's default was willful and mala fides, and prayed punitive damages.

Defendant Keshner's amended answer admitted the payment of the $15,000 and the experience of Keshner as a cattle breeder and trader. It pleaded ignorance as to Wick's inexperience. It asserted the transaction was a simple sale, and denied all representations in connection therewith. It stated that six heifers and nine cows were "selected" from the defendant's herds and later "segregated," but it did not allege who selected or segregated them. The amended answer also challenged the adequacy of the complaint to state a claim, pleaded laches, and set up a Missouri in rem judgment in a suit by Keshner against Wick for feed and services to the allotted cattle. It also denied any undertaking by Keshner to return Wick's money if Wick were dissatisfied with the allotment made.

The cause was tried in the District Court without a jury. The District Judge ruled against Wick on his principal claim, but found that the judgment for feed and services obtained by Keshner was excessive in the amount of $3,111.50 and awarded Wick a judgment for that sum.

Wick's appeal to the Court of Appeals then followed, and it affirmed the District Court judgment in all respects.

(f) **Review of State Court Decision Not Involved.**

No review of a decision of a state court is here involved.

(g) **Basis of Federal Jurisdiction in First Instance.**

The basis for federal jurisdiction in the first instance in this cause was diversity of citizenship, Wick being a citizen of Illinois and Keshner a citizen of Missouri.

(h) **Argument Amplifying Reasons for Allowance of Cross-Writ.**

I.

The portion of the opinion of the Court of Appeals which determined the issue of fiduciary relationship adversely to the contention of Wick consists of approximately 800 words in three paragraphs, beginning with Paragraph [12] and ending with Paragraph [14]. Approximately 50 percentum of the language used was verbatim quotation from the defendant's brief, the only changes being the elimination of record references, the correction of grammar and the employment of additional and more forceful adjectives.

No case or authority cited by plaintiff was mentioned. The essential basis of plaintiff's contention that a fiduciary relation existed (a disparity in knowledge and experience in respect of cattle as between the parties) was not set forth.

Fairly analyzed, the opinion ruled that there existed no fiduciary relationship between the plaintiff and defendant in respect of the cattle transaction for the following reasons:

1. The trial judge found no such relationship existed; his finding is presumptively correct and should

not be set aside unless clearly erroneous under the provisions of Rule 52 (a) of the Federal Rules of Civil Procedure (Opinion, Par. [12]).

2. The evidence sustains a finding that no such relationship existed, because (Opinion, Par. [12]):

(a) Plaintiff was a successful business man, of substantial means and business experience, who could afford to and did fly his own airplane around the country,

(b) His interest in the cattle business was not aroused by the defendant, but by his own employee, Miss Mary Lou O'Haran, who had previously bought cows from the defendant and attended sales of Angus cattle; and plaintiff had discussed with her the buying of Angus cattle,

(c) Plaintiff went to the International Show at Chicago in the Fall of 1951: Miss O'Haran was then keeping cattle; plaintiff was introduced to defendant by Miss O'Haran's mother at the show; and plaintiff at that time expressed to defendant his interest in cattle,

(d) Shortly before the transaction in suit between plaintiff and defendant they, with Miss O'Haran, attended two cattle sales in Oklahoma, and each of them bought a one-third interest in a cow costing $3,000; and cattle were discussed then,

(e) Plaintiff had great confidence in Miss O'Haran's knowledge of pure-bred Angus cattle and brought her with him when the transaction was closed, and this showed that plaintiff was not relying only upon what defendant told him about the cattle,

(f) Before entering into the transaction with defendant, plaintiff had attended three showing and sales of pure-bred Angus cattle,

(g) Miss O'Haran was with plaintiff when the defendant pointed out the cattle which were to be the subject of the transaction between plaintiff and defendant,

(h) Plaintiff was looking for a place to invest surplus funds,

(i) Plaintiff had the advice and counsel of his trusted employee, Miss O'Haran, who had experience in the purchase and maintenance of cattle,

(j) Defendant did not seek out plaintiff and attempt to sell him Angus cattle, and

(k) The cattle were accessible and visible to plaintiff and Miss O'Haran and there was no effort made to prevent plaintiff from thoroughly inspecting them and ascertaining their value.

3. "To entitle plaintiff to recover not only must it be made to appear that he in fact relied upon the alleged misrepresentations of the seller, that he had a right to rely thereon, and that he was induced thereby to make the purchase, but it is generally held that where the buyer has an opportunity equal to that of the seller to investigate and ascertain the truth or falsity of the seller's representations with respect to the property, he has no right to rely upon the representations and cannot, in the absence of actual fraud on the part of the seller, avail himself of them. 'The law affords to everyone a reasonable protection against fraud in dealing, but it is not an indulgent guardian which can go to the romantic length of giving protection against the consequence of indolence, folly or careless indifference to the ordinary and accessible means of information' " (Opinion, par. [13]).

While Point 3, last quoted, may be correct as an abstract enunciation of law where a claimed misrepresentation is

presented without attending circumstances, we feel it is clear that it is without relevancy to the question of **Whether a Fiduciary Relation Exists**, and we will confine our remarks to the matters we have set out as Point 1 and Point 2.

Point 1.

The Court of Appeals asserts that a short answer to ou contention of fiduciary relationship would be that the trial judge found that it did not exist, and that his findings, under Rule 52 (a) are presumptively correct and not be reversed unless clearly erroneous. But a finding that a legal relationship has not arisen from facts proved is not a finding of fact under Federal practice, but a conclusion of law, regardless of its appellation by the judge.

Dalehite v. United States, 346 U. S. 15, 24 (note);
Chandler v. United States (CA—7), 226 F. 2d 403, 405;
Guerrini v. United States (CA—2), 167 F. 2d 352, 356.

And a conclusion of law is not presumptively correct or immune to reversal unless clearly erroneous; to the contrary, its deliberate review is the function of appeal.

Kweskin v. Finkelstein (CA—7), 223 F. 2d 677, 678.

Point 2.

The listing of Sub-points (a) to (k), inclusive, under Point 2, above, is a fair and accurate synopsis of the grounds put forth. If the recitations therein reflected are to be regarded as having any logical connection with the contention made by the plaintiff (that the disparity in knowledge respecting cattle between plaintiff and defendant gave rise to an obligation of fiduciary nature on the part of defendant) and with the disposition of that contention by the Court ("no relationship of trust or confidence arose," Opinion) they must be regarded as being put forward to establish one or the other of the following propositions:

(1) That plaintiff's knowledge of cattle at the time of the transaction in question was not markedly inferior to the knowledge possessed by defendant.

(2) That plaintiff, in the transaction, had the advice of a skilled cattle trader with knowledge of the subject equal to that possessed by defendant, and therefore any inequality which otherwise might have existed has been cancelled out.

(1)

If the purpose of the recitations was to show that plaintiff's knowledge was not markedly inferior to defendant's, then we respectfully submit that the Court ignored the specific finding of the trial judge to the contrary (Findings of Fact, Rec. 82):

"2): * * * The defendant, Joseph Keshner, has been in the cattle business since 1918, and has, since about fifteen years prior to the trial of this case, specialized in the business of buying, breeding, raising and selling Aberdeen-Angus cattle. The plaintiff had little knowledge of the cattle business at the time of the making of the contract involved in this case."

This finding, one of ultimate fact within the contemplation of the Federal rules, does have the binding character which the Court erroneously, we think, would ascribe to the conclusion that a relation of confidence did not exist. If any residue of doubt remains that the finding establishes the knowledge and experience of the defendant, then we respectfully refer to the fact, also overlooked by the Court and not mentioned by it in its summary of the pleadings (see p. 5), that defendant, in his answer (Paragraph 2), specifically admitted that "he [had] for a long time held himself out as and [was] an expert in the valuation, breeding, raising, buying and selling of beef cattle and other livestock" (Rec. 1, 8).

On the other hand, if the Court's purpose was to show that plaintiff acted with the advice and counsel of a skilled cattle trader, equal in knowledge and experience, to the defendant, then we feel and respectfully point out that the Court must have overlooked the record facts (a) that Miss O'Haran, at the time of the transaction, was 21 or 22 years old (Rec. 53), (2) that her cattle interests were evidently at most a hobby, pursued on her father's farm in her spare time as an employee of the organ factory (Rec. 53), and that she owned but six cows and bought her first cow 18 months previously (Rec. 53). To characterize her, even by implication or inference, in any way as the equal of defendant in respect of cattle knowledge seems almost incredible.

II.

Plaintiff contended, as an essential part of his theory of fiduciary relationship, that the defendant selected the cattle that were allotted to him. The Court of Appeals dismissed his contention with three sentences (Opinion, Par. [15]):

> "The suggestion that defendant selected the animals the plaintiff was buying is not borne out by the record. The record discloses that defendant merely pointed out which of the cattle he in fact owned which were the subject of the sale. This was necessary because other cattle in the herd belonged to other parties and no one else present had sufficient knowledge to point out which of the cattle were the subject of the sale."

In so doing, the Court merely accepted at face value the argumentative assertion in defendant's brief, made without record references, and ignored the actual record, quoted in plaintiff's brief in extenso as follows:

The testimony of Wick (Rec. 39):

"We came on back to Good Earth Farm, and I agreed to invest in 15 cattle, which Keshner was to pick out. . . . All I knew was that I was giving him $15,000, and he in turn would pick but cattle.

"You could see the chains on the cows, but not the numbers. Keshner said, 'The cattle with the two chains are the cattle for you.'

"Keshner was picking out the cattle; not I."

The testimony of Keshner (Rec. 30):

"Q. (By Mr. Lucas) Did you at any time represent to him (Wick) out of what particular herd, prior to February 9, did you represent to him at any time out of what particular herd you were going to select the ones that you were going to sell him?

"A. (By Mr. Keshner) I told him I would pick them out of the Ellis herd that I had purchased.

. . . . . .

"Q. (By Mr. Lucas) And I believe you testified, did you not, that prior to accepting the check from plaintiff Wick, you went down and pointed out to him the cattle you were selling, is that right?

"A. (By Mr. Keshner) I did.

"Q. Tell us exactly what you did in connection with that.

"A. Well, he had a copy of the numbers that were—that I had chose for him."

The testimony of Mary Lou O'Haran, with Wick and Keshner when the transaction was originally planned and when Wick paid $15,000 to Keshner (Rec. 53):

"There was conversation about cattle on the trip [to Oklahoma, preceding the transaction in controversy]. Keshner told Wick, in substance, the glories of the cattle business. He told him the profit that was

to be made from it, the sales, the averages that were going on, the fact that Angus cattle were the best beef cattle in the world, and things of that sort. At one point Mr. Keshner said that the return would be about 25% on the investment; that it was just like clipping coupons. He said the cow drops a coupon once a year, and you can't lose if the Good Lord don't call them home.

"I next accompanied Mr. Wick to the Good Earth Farm on February 9. I wasn't present when Mr. Wick paid money to Mr. Keshner; I was in the kitchen. Mr. Wick, Mr. Keshner, my sister Pat and I walked into a field and looked at some cattle. About 25 or 30 were in the herd. Mr. Keshner said that among these were the cattle that he was going to allot to Mr. Wick."

III.

As the selection by Keshner of the allotted animals was an essential part of Wick's case, so also was the value of the allotted animals. Wick had paid $15,000 for the allotment of 15 cows, and he placed on the stand two admitted cattle experts who testified that at the time of the allotment the 15 animals allotted were worth, on an average, not more than $507 (Rec. 46-50). Their testimony was without substantial contradiction. Yet the Court of Appeals, in its opinion, did not mention this evidence, but instead made the following statement (Opinion, Par. [15]):

> "It must also be borne in mind that there was testimony that the cattle purchased by plaintiff were worth $1,000 per head and the court specifically found that the proof did not establish that the cattle were not worth that amount and on this issue the burden of proof was on the plaintiff."

But there was no testimony that the cattle were worth $1,000 per head—the defendant himself, an admitted cattle

expert, did not so testify, and the closest approach to it was the testimony of a neighboring farmer who said he would have bought some at that price if he had the money (which he didn't have), and the District Court did not specifically find that the proof did not establish that the cattle were not worth that amount.

The alleged failure of the allotted cattle to have had a value equalling at least $1,000 a head was the gist of the action in the District Court (Complaint, I, Par. 7, Rec. 4; Complaint, II, Par. 3, Rec. 6), and the Federal rules imperatively required a finding on the issue. Dalehite v. United States, 346 U. S. 15, 24 (note); Maher v. Hendrickson (CA-7), 188 F. 2d 700, 702; Ohlinger v. United States (CA-9), 219 F. 2d 310, 311; Skelly Oil Co. v. Holloway (CA-8), 171 F. 2d 671, 673. The District Court did not make the finding, and this was one of the grounds of Wick's appeal to the Court of Appeals. The ground was ignored, as stated above.

The premises, considered, petitioner Martin M. Wick prays that there be allowed a cross-writ of certiorari to review the judgment of the Court of Appeals for the Eighth Circuit in respect of the matters herein complained of.

Respectfully submitted,

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APPENDIX.

(OPINION.)

United States Court of Appeals
For the Eighth Circuit.

No. 15,686

Martin M. Wick, Appellant,

vs.

Joseph Keshner, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[May 7, 1957.]

Emerson Baetz for Appellant.

Wilder Lucas and George A. Spencer (Ralph T. Finley was with them on the brief), for Appellee.

Before Gardner, Chief Judge, and Johnsen, Circuit Judge, and Donovan, District Judge.

Gardner, Chief Judge.

[1] This action was initiated by the filing of a complaint containing two counts. Appellant was plaintiff below and we shall refer to the parties as they were designated in the trial court. While the complaint contained two counts there was but one transaction involved and the counts of the complaint represent two versions of that transaction.

[2] By the first count plaintiff sought to recover damages in the amount of $30,000 based upon a breach of a duty

arising from a fiduciary relationship alleged to exist between the plaintiff and defendant. It was alleged that the defendant represented that he was engaged in the business of breeding, raising, buying and selling of beef cattle and other livestock and was a man of wide experience in his vocation and held himself out as an expert in the valuation, breeding, raising, buying and selling of beef cattle and other livestock; that plaintiff, on the other hand, was a pipe organ manufacturer without experience or knowledge in the business of breeding, raising, buying or selling of beef cattle or other livestock; that at the time mentioned in the complaint plaintiff and defendant discussed the possible investment of $15,000 by plaintiff in the business of beef cattle raising operated by defendant; that by way of inducement to such investment by plaintiff, defendant represented that if plaintiff would make such an investment he might realize a 25% per annum profit on such investment and that several other persons of wealth had made similar investments with him and that defendant was anxious to expand his clientele to include persons not engaged in agricultural pursuits; that defendant represented that in the event of such investment by the plaintiff defendant would either purchase animals for him or segregate animals from the defendant's herd and that thereafter defendant would keep, feed and maintain the animals, breeding them and crediting plaintiff with the progeny and that by reason of defendant's experience he was highly skilled in the art of buying and selling cattle and that by reason of his skill plaintiff's investment would be without risk of loss; that defendant represented that profit and income on such an investment would accrue to the investor when the herd allotted the investor reached thirty in number and that the cost of keeping, feeding, breeding and maintaining the animals allotted to an investor would not exceed $200 per year per head and that the initial expense of feeding and maintaining would be borne by defendant until the investment had attained a

profitable status and that defendant would have no obligation with respect to the physical keeping of the animals; that defendant represented that he was anxious to expand his clientele to the community of Highland, Illinois, where plaintiff resided, and that if plaintiff would invest with him defendant would personally allot to him at a price of $1,000 per head cattle of an actual value of $2,000 per head and would allot him cattle described as heifers and young matrons not over two years of age with pedigrees fully warranting the sum total of plaintiff's investment; that defendant represented that it was his uniform practice to offer to return to investors or purchasers such money invested or paid in the event of dissatisfaction on their part but that defendant had never experienced dissatisfaction on their part and had never been required to refund any money but that if plaintiff were at any time dissatisfied with his investment if made, defendant would refund his entire investment; that by reason of the statements and representations made to plaintiff by defendant plaintiff was induced to and did deliver and pay over to defendant the sum of $15,000 and defendant took, received and appropriated such sum; that notwithstanding the alleged confidential relationship existing between plaintiff and defendant, defendant failed to carry out and perform the representations and inducements made and did not exercise good faith in the use and employment of the money paid him by plaintiff in that initially the defendant failed and refused to allot any animals from his herds to the plaintiff and that upon the plaintiff's demand to be shown animals allotted to him the defendant segregated fifteen cows from his herds but that one was in excess of eleven years of age, one was in excess of nine years of age, four were in excess of eight years of age and three were in excess of seven years of age and that none had a pedigree or other characteristic which would make the average value of the allotted animals $2,000 per head or would make the total value of the allotted animals $15,000 to equal the amount

of money paid defendant by plaintiff; that the animals allotted to plaintiff were of a true and actual value not exceeding $300 per head; that upon learning the ages, characteristics and value of the animals allotted to him plaintiff demanded the return of his money, which demand the defendant refused and thereafter ordered plaintiff to remove from defendant's premises the animals allotted to plaintiff; that on the failure of plaintiff to remove the animals so allotted to him defendant billed plaintiff for feed, maintenance and breeding of the animals and upon plaintiff's failure to either remove the animals or pay the bills for feeding, maintenance and breeding defendant foreclosed his agister's lien resulting in the sale of the animals; that plaintiff had at no time acquiesced in the allotment of cattle made to him by defendant but had at all times repudiated it and demanded the return of his investment; that defendant did not intend to perform and comply with the representations made to plaintiff but, on the contrary, affirmatively intended not to perform and comply with such representations. Plaintiff then demanded judgment against defendant awarding him the return of the $15,000 paid to defendant by plaintiff and punitive damages in like amount.

[3] In the second count of his complaint plaintiff seeks to recover for breach of contract, alleging that he purchased from defendant fifteen cows for the agreed price of $15,000. He realleges the charges of fraud in the inducement, the payment of the $15,000 and the alleged agreement to refund such money at any time in the event of plaintiff's dissatisfaction. It is then alleged that in reliance on these representations plaintiff paid to defendant the agreed purchase price but that defendant in disregard of his obligations under the said contract of sale delayed in allotting any animals from his herd to plaintiff and that when he did allot them none of the cows had a value of $2,000 as agreed nor did the total value of the animals purchased amount to $15,000 but that the actual value of

the animals did not exceed $300 per head, which defendant well knew. Plaintiff therefore charged defendant with a breach of his contract from which he allegedly suffered $15,000 in damages, being the amount invested, and then realleged the charges of fraud as alleged in Count I of his complaint and asked for $15,000 additional punitive damages.

[4] By way of answer defendant denied all allegations of fraud or misrepresentation on his part, denied that the relations of the parties were confidential, admitted that he sold plaintiff fifteen head of cows at the agreed price of $15,000 and admitted that plaintiff had paid him the purchase price therefor, but denied that there was any agreement to refund plaintiff the purchase price if he should become dissatisfied with his bargain. Defendant also admitted that he agreed that he would keep plaintiff's cattle at $200 per year per head and feed, breed and maintain them until plaintiff could move them. Defendant affirmatively alleged that after the sale had occurred and the cows had given birth to calves the cows and calves were registered by defendant for plaintiff in plaintiff's name with the American Aberdeen Angus Association. Defendant further alleged that after a drop had occurred in the price of cattle in September of 1952 plaintiff requested his money back which defendant refused to give him; that after defendant had furnished plaintiff with the registration certificates of the cattle he asked plaintiff whether or not he wished to sell the calves that had been born to these cows as he had a purchaser for them who would pay from $250 to $300 per calf, but that plaintiff would not agree to that nor did he return the registration certificates on the calves so that they could be sold. Defendant further alleged that after plaintiff demanded return of the purchase price paid for said cattle defendant repeatedly billed plaintiff for breeding, keeping, maintaining and feeding the fifteen cows and their progeny, which demands being

declined defendant finally sued plaintiff to foreclose defendant's agister's lien against the fifteen cows and their progeny and in such proceeding recovered judgment in partial satisfaction of which the catttle were sold.

[5] The answer to the second count, in substance, alleged that there was a sale of fifteen cows for $1,000 apiece, realleged substantially all of the matters set forth in answer to Count I of plaintiff's complaint and denied the confidential relationship between plaintiff and defendant and the allegations of purported representations made by defendant to plaintiff to induce plaintiff to enter into the contract.

[6] The two causes of action were not pleaded in the alternative but so far as appears from the pleadings plaintiff was seeking to recover money judgments aggregating $60,000. There was no motion to require plaintiff to elect on which cause of action he would proceed. The action was tried to the court without a jury. It appeared from the evidence that at all times pertinent to the issues plaintiff was a man in his thirties and manager of a pipe organ manufacturing enterprise in Highland, Illinois. The defendant, a somewhat older man, operated a stock farm devoted to the breeding, raising, selling and maintenance of Aberdeen-Angus cattle near New Florence, Missouri. The plaintiff and defendant became acquainted through a young lady, one Mary Lou O'Haran, who was one of plaintiff's employees, and in the early part of 1952 the plaintiff, defendant and Miss O'Haran made a trip to Oklahoma to attend a sale of Angus cattle and at the sale purchased an Angus cow for $3,000, each of the three furnishing $1,000 of the purchase price. During the course of the trip it developed that the plaintiff, for the purpose of investment, was interested in buying some Angus cattle. Several days after the trip to Oklahoma the plaintiff went over to defendant's farm and purchased fifteen Angus

cows from defendant for $15,000, which plaintiff paid at that time. Mary Lou O'Haran was with the plaintiff at the defendant's farm when the purchase was made.

[7] At that time the defendant pointed out to plaintiff the cattle that he was purchasing, indicating that they had on double neck chains. By agreement between the parties the cattle were left on the defendant's farm and the defendant was to board them for an indefinite period of time at a reasonable rental not to exceed $200 per year per cow for which he was to be paid by the plaintiff at least once every six months or a year. Plaintiff had little knowledge of cattle, Angus bred or otherwise.

[8] Between February 9 and September 20, 1952, the plaintiff made several trips to defendant's farm to look at his cattle, usually in company with Miss O'Haran. The testimony also shows that shortly after the transaction in question defendant took a trip to Hawaii and that not long after his return the fifteen cows in question were registered with the American Aberdeen Angus Breeders Association in the name of plaintiff and that several calves that had been born to said cows were also registered in plaintiff's name. On September 20, 1952, defendant conducted one of his cattle sales which the plaintiff attended. After this sale at the defendant's farm the plaintiff also attended a cattle sale at or near Columbia, Missouri, and one near Kansas City, Missouri. Following these cattle sales the plaintiff concluded that the cattle he had purchased were not worth what he had paid for them, that the defendant had misrepresented the facts to him and he asked the defendant to return his $15,000, which the defendant refused.

[9] Following some correspondence and conversation between the parties defendant finally ordered plaintiff to remove his cattle from defendant's farm, which the plaintiff refused to do, and thereupon defendant made a demand against plaintiff for some $6,000 for feed and breeding

purposes which plaintiff refused to pay. Thereafter, defendant filed suit for an agister's lien upon which he was given judgment for $6,231.50 by a magistrate in Montgomery County, Missouri. The fifteen cows and their fourteen calves were then sold by the sheriff for $6,650 at an execution sale and after the costs and fees, totaling $838.50 were paid, the defendant received $5,811.50 on his judgment. There was no written contract between the parties. The facts will be further developed in the course of this opinion.

[10] On the evidence produced the court found the issues in favor of defendant so far as the causes of action pleaded were concerned, but found upon the evidence admitted without dispute that plaintiff was entitled to recover $3,111.50. The court specifically found, in effect, that the parties at all times pertinent to the issues here involved were dealing at arm's length and that no fiduciary relationship existed between them and that plaintiff did not turn over to defendant the sum of $15,000 or any other sum for investment as contended by him; but that plaintiff purchased fifteen Angus cows for $15,000 and gave defendant a check for same; that Mary Lou O'Haran, an employee of plaintiff, was with plaintiff at defendant's farm the day of the sale and that Miss O'Haran resided on a farm near Highland, Illinois, and began buying Aberdeen-Angus cattle in 1950 and at the time of trial owned six females, a bull and several calves of the Aberdeen-Angus breed; that "the defendant did not guarantee to the plaintiff that he would have a 25% return on his investment and that the investment would be without risk"; that "The defendant did not represent to plaintiff that the initial costs of boarding the cattle would be carried on by the defendant until the investment had attained a profitable status by reason of the production of progeny and the sale thereof"; and that "The defendant did not represent that the 15 cattle he would sell the plaintiff were

worth $2,000 per head, but that he would sell them to plaintiff for $1,000 per head." The findings will be further developed in the course of this opinion.

[11] On the findings the court concluded as a matter of law that plaintiff was not entitled to recover on the causes of action pleaded in his complaint but, as heretofore noted, entered judgment for plaintiff in the sum of $3,111.50. From the judgment so entered plaintiff has appealed and seeks reversal on substantially the following grounds: (1) the court erred in concluding as a matter of law that no fiduciary relationship existed between plaintiff and defendant; (2) the court erred in not concluding as a matter of law that the fiduciary relationship existing between plaintiff and defendant prohibited defendant from allotting to plaintiff cattle of a reasonable value less than the amount paid defendant by plaintiff, (3) the court erred in failing to find that the cattle allotted to plaintiff by defendant were of a reasonable value less than the amount paid defendant by plaintiff, and that defendant knew they were of such value, and (4) the court erred in not finding that regardless of whether there was a fiduciary relationship between the parties there was a breach of contract by defendant in allotting cattle not reasonably worth the money paid him by plaintiff.

[12] In the final analysis it is clear that plaintiff bottoms his right to recover on the alleged fact that there existed between the plaintiff and defendant a fiduciary relationship which required defendant to act with the utmost good faith towards the plaintiff and not to overreach him for defendant's benefit. The short answer to this contention would seem to be that the court found that no such relationship existed between plaintiff and defendant and that in the transaction here involved they acted at arm's length. This finding is, of course, presumptively correct and should not be set aside unless clearly erroneous. Rule 52 (a), Federal Rules of Civil Procedure. It is, however, urged by

plaintiff that this finding is not sustained by the evidence. It is not our purpose to restate the evidence on this question in detail. Though it may be somewhat repetitious, we observe that the evidence shows that plaintiff was a successful business man, the head and owner of a manufacfacturing company and a man of substantial means and business experience who could afford to and did fly his own airplane around the country. His interest in the cattle business, as previously stated, was aroused not by the defendant, but by his employee, Miss O'Haran, who had purchased from the defendant two pure-bred Angus cows at $1,000 a head in 1950 and who attended numerous sales of pure-bred Angus cattle where these were shown. She had taken leave from her work to attend one of the cattle sales in Texas in 1951 and plaintiff discussed with her before and after her departure the buying of Angus cattle. Plaintiff went to the International Show in the Fall of 1951. Miss O'Haran was then keeping Angus cattle which she owned on her father's farm. This young woman's mother introduced defendant to plaintiff at this International Show in Chicago and plaintiff expressed his interest in cattle at that time to defendant. Early in 1952 it appeared that plaintiff, defendant and Miss O'Haran attended two sales in Oklahoma, each buying a third interest in an Angus cow costing $3,000, and cattle were discussed, resulting in an offer by defendant to sell plaintiff fifteen head of pure-bred Angus cattle at $1,000 a head. The transaction, however, was not closed at that time, but plaintiff returned to defendant's farm on February 9, 1952, and again took with him Miss O'Haran in whom he had great confidence as to her knowledge of pure-bred Angus cattle. In other words, plaintiff was not relying only upon what defendant might tell him about the cattle he was buying. By the time plaintiff purchased the cattle he had attended, according to the record in this case, three showings and sales of pure-bred Angus cattle, including the International Show in Chicago. Miss O'Haran

accompanied plaintiff when defendant pointed out to plaintiff the cattle he was intending to sell him. Plaintiff was looking for an investment of surplus funds. He had the advise and counsel of his trusted employee, Miss O'Haran, who had experience in the purchase and maintenance of Angus cattle. Defendant did not seek out the plaintiff and attempt to sell him Angus cattle. The cattle in question were accessible and visible to the plaintiff and his advisor and there was no effort to prevent plaintiff from thoroughly inspecting the quality of the cattle and ascertaining their market value.

[13] To entitle plaintiff to recover not only must it be made to appear that he in fact relied upon the alleged misrepresentations of the seller, that he had a right to rely thereon, and that he was induced thereby to make the purchase, but it is generally held that where the buyer has an opportunity equal to that of the seller to investigate and ascertain the truth or falsity of the seller's representations with respect to the property, he has no right to rely upon the representations and cannot, in the absence of actual fraud on the part of the seller, avail himself of them. As said in **Dickinson v. Bankers Life & Casualty Company**, Mo., 283 S. W. 2d 658, cited with approval in **Woolfolk v. Jack Kennedy Chevrolet Company**, Mo., 296 S. W. 2d 511:

> "The law affords to every one a reasonable protection against fraud in dealing, but it is not an indulgent guardian which can go to the romantic length of giving protection against the consequence of indolence, folly or careless indifference to the ordinary and accessible means of information."

[14] The court in the instant case therefore correctly held that no relationship of confidence or trust arose as a result of the dealings between plaintiff and defendant.

[15] The suggestion that defendant selected the animals the plaintiff was buying is not borne out by the rec-

ord. The record discloses that defendant merely pointed out which of the cattle he in fact owned which were the subject of the sale. This was necessary because other cattle in the herd belonged to other parties and no one else present had sufficient knowledge to point out which of the cattle were the subject of sale. Where, as here, the parties dealt at arm's length defendant might properly commend the property he was selling without being guilty of fraud or misrepresentations. This is commonly accepted as trade talk, seller's statements or puffing, and a statement as to value is universally held to be a representation as to which the doctrine of caveat emptor applies. It must also be borne in mind that there was testimony that the cattle purchased by plaintiff were worth $1,000 per head and the court specifically found that the proof did not establish that the catle were not worth that amount and on this issue the burden of proof was on the plaintiff.

[16] Plaintiff in his complaint charged the defendant with various alleged misstatements of fact and various alleged fraudulent acts and testified to such statements and acts. As to these it is significant that the court on conflicting evidence specifically and categorically found in favor of defendant. This is illustrated by the following findings:

"14): * * * the defendant did not guarantee to the plaintiff that he would have a 25% return on his investment and that the investment would be without risk.

"15): The defendant did not represent to plaintiff that the initial costs of boarding the cattle would be carried on by the defendant until the investment had attained a profitable status by reason of the production of progeny and the sale thereof.

"16): The defendant did not represent that the 15 cattle he would sell the plaintiff were worth $2,000

per head, but that he would sell them to plaintiff for $1,000 per head."

[17] We are convinced that in finding in favor of defendant and against the plaintiff on the two causes of action set out in plaintiff's complaint the court committed no prejudicial error and the judgment in that regard is therefore affirmed.

[18] It remains to consider the contention of defendant that the judgment in favor of plaintiff for $3,111.50 is unwarranted and void. Defendant is the appellee and he took no appeal from any part of the judgment. He was the successful litigant so far as the two causes of action pleaded in plaintiff's complaint are concerned. Not having filed a cross-appeal he cannot be heard to question the legality of the judgment as entered, nor can he allege error in its entry. **Peoria Ry. Co. v. United States**, 263 U. S. 528; **Devine v. Zimmerman**, 8 Cir., 133 F. 2d 850; **United States Fidelity & Guaranty Co. v. Sweeney**, 8 Cir., 80 F. 2d 235; **Blackhurst v. Johnson**, 8 Cir., 72 F. 2d 644; **Barnsdall Refining Corp. v. Cushman-Wilson Oil Co.**, 97 F. 2d 481. In **Peoria Ry. Co. v. United States**, supra the court said:

> "The appellees can be heard before this Court only in support of the decree which was rendered."

[19] In **Devine v. Zimmerman**, supra, the appellees attemped to urge error in the dismissal of their complaint. In denying their right so to do we said, inter alia:

> "In passing it should be observed that plaintiffs also complain of this action of the court in dismissing their complaint, but not having appealed they cannot be heard to complain of the judgment as entered."

[20] The same rule was announced by this court in all the above cited cases. Thus, in **United States Fidelity & Guaranty Co. v. Sweeney**, supra, we said:

"Ordinarily, an appellee who files no cross-appeal is bound by the judgment as entered."

[21] And in **Blackhurst v. Johnson,** supra, in referring to the right of an appellee who has not filed a cross-appeal to urge error we said:

"She has, however, not appealed, and questions decided adversely to a party who has not appealed will not be considered on appeal. Appellees can be heard only in support of the decree which was rendered."

[22] We therefore pretermit any consideration of the grounds urged by defendant in support of his contention as the matter is not properly before us. The judgment as entered is presumptively correct and even if the part of the judgment now complained of by defendant were vulnerable to attack had he filed a cross-appeal on the ground that it was not warranted by the pleadings we might still, in support of the judgment, assume that the pleadings had been amended to conform with the proof admitted in evidence without objection. The judgment here complained of must therefore be sustained. It results that the judgment as entered is affirmed in its entirety.